Far West Fibers, Inc. d/b/a E-Z Recycling *and* Association of Western Pulp and Paper Workers, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Cases 36–CA–8233 and 36–CA–8271

August 7, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On June 7, 1999, Administrative Law Judge James M. Kennedy issued the attached bench decision.[1] The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act when it issued a warning and 1-day suspension to employee Krista Henson on June 16, 1998,[3] because of her union activities. For the following reasons, we disagree with the judge's findings.

On June 16 Supervisor and Plant Manager Keith Ristau issued a written warning and suspension to Henson for being rude to a customer on the telephone. In issuing the discipline, the Respondent explained to Henson that she was receiving the reprimand because this was her second warning about poor customer service and that the Respondent considered her April 1 appraisal to be a first warning. That appraisal stated, inter alia, that Henson could be short or abrupt with customers and that she needed to improve her customer relations.

In finding the violation, the judge found fault with the Respondent's reliance on Henson's appraisal as a first warning. The judge observed that calling an appraisal a warning was an "unusual deviation from standard procedure" and was a "devious way to advance to the punishment stage." The judge concluded that the Respondent's reliance on the appraisal as a first warning demonstrated animus against the Union.

Contrary to the judge, we do not find that this warning and suspension violated Section 8(a)(3) and (1) of the Act. The Respondent's disciplinary policy states that, if an employee has received two write ups, the employee may be issued a suspension. Here, the uncontradicted evidence shows that the Respondent advised Henson in her appraisal to improve specific areas of her performance, including her customer relations. The evidence also shows that Henson continued to be discourteous to the Respondent's customers, despite the initial warning in her appraisal to correct her attitude. The Respondent disciplined Henson on June 16 for engaging in the same type of inappropriate behavior criticized in her appraisal. For this reason, we conclude that, even assuming that the General Counsel established that Henson's union activity was a motivating factor for the June 16 reprimand and suspension, the Respondent has shown, by a preponderance of the evidence, that it would have issued the discipline even in the absence of Henson's union activity.[4] Accordingly, we dismiss this allegation of the complaint.

2. The judge found that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Henson about her union activities, and by creating an impression of surveillance of her union activities. The judge also found that the Respondent engaged in actual surveillance by deceptively obtaining the credit card receipt of union organizer and statutory employee Tom Simmons.[5] We agree with the judge's finding that this conduct interfered with the Section 7 rights of the Respondent's employees. Further, we also agree with the judge's finding, as set

[1] The procedures for issuing bench decisions are set forth in Secs. 102.35(a)(10) and 102.45 of the Board's Rules and Regulations (the Board's Rules). Sec. 102.35(a)(10) requires that a judge issue a bench decision within 72 hours after the conclusion of the oral argument. Further, Sec. 102.45 requires, inter alia, that if a judge delivers a bench decision, the judge shall, "promptly upon receiving the transcript," certify the accuracy of the transcript pages and file with the Board a certified copy of those pages together with any supplementary matter the judge may deem necessary to complete the decision. The purpose of these rules is to expedite the issuance of unfair labor practice cases suitable for bench decisions. See 59 Fed.Reg. 65942–65943 (1994).

Here, the hearing was held on April 6, 1999; the oral argument was held (by telephone conference) on May 3, 1999; the bench decision was rendered (also by telephone conference) on May 19, 1999; the transcript of the bench decision was received in the Office of the Division of Judges on June 1, 1999; and the certification was issued on June 7, 1999. Thus, the bench decision was not issued within 72 hours after conclusion of the oral argument, as required by Sec. 102.35(a)(10). In addition, the certification was not issued "promptly" after receipt of the transcript, as required by Sec. 102.45. Furthermore, although not strictly proscribed by the Board's Rules, the procedure utilized here was inefficient in that it resulted in the parties and the court reporters being called back twice, once for the oral argument and again for the bench decision.

[2] We shall modify the judge's recommended Order, as set forth in full below, and issue a new notice to conform to the violations found herein and in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also substitute in the new notice the term "surveillance" for the term "spy." See *Centeno Super Markets,* 220 NLRB 1151 fn. 5 (1975), enfd. 555 F.2d 442 (5th Cir. 1977), cert. denied 434 U.S. 1064 (1978).

Further, we find that the judge's recommendation of a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner" is not warranted in this case. The Respondent has not engaged in such egregious misconduct as to demonstrate a general disregard for the employees' statutory rights. Accordingly, we shall substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." *Hickmott Foods*, 242 NLRB 1357 (1979).

[3] All dates are in 1998, unless stated otherwise.

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] Simmons is a volunteer organizer for the Union. Simmons is also an employee of Fiber Web North America in Washougal, Washington, an affiliate company of Far West Fibers, Inc.

forth below, that the Respondent's conduct with regard to Simmons' credit card receipt violated Section 8(a)(1) because it had the reasonable tendency to interfere with Simmons' right to serve as a union organizer.

On July 7 the Union, through Simmons, decided to sponsor a free pizza lunch for the Respondent's employees. On July 8, Henson ordered the pizza from the Round Table restaurant and Simmons paid for it with his personal VISA credit card. When the Respondent's assistant plant manager, Mike McCracken, learned of the luncheon from another employee, he asked Henson who paid for the food. Henson asserted that she prepaid for it by credit card and did not have the receipt.[6] In order to verify Henson's representation that she had paid for the pizza, McCracken called the restaurant, falsely claimed to be an associate of Simmons, and asked for a copy of the credit card receipt. He then drove to the restaurant and got a reprint of the receipt from the manager. Based on that evidence, the Respondent's general manager, Mary Sue Smith, instructed McCracken to issue a warning to Henson for lying to McCracken about the source of the pizza. Later that afternoon, Henson continued to deny to Smith and McCracken that the Union was the source of the pizza. After confronting Henson with Simmons' credit card receipt, Smith and McCracken issued Henson a warning and told her that her next transgression would result in termination.[7]

The judge found, inter alia, that Simmons' statutory right to serve as a union organizer was violated when McCracken, claiming to be verifying Henson's story, obtained a copy of Simmons' credit card receipt from the restaurant by falsely claiming to be an associate of Simmons. The judge concluded that the Respondent interfered with Simmons' right to serve as a union organizer because it demonstrated that it could gain access to Simmons' personal finance record. We agree.

The record shows that Simmons was employed by an affiliate company of the Respondent. As such, he was an employee within the meaning of Section 2(3) of the Act. Thus, Simmons engaged in protected activity when he sought to organize the Respondent's employees, and when he purchased a pizza lunch for those employees as part of his organizing effort. The Respondent's conduct in deceitfully investigating and obtaining Simmons' credit card receipt would reasonably tend to discourage Simmons from engaging in such protected activities and serving as a volunteer union organizer. It also likely could discourage the Respondent's employees, to the extent they became aware of their employer's conduct, from engaging in similar activities. Accordingly, we conclude that the Respondent's conduct with regard to the credit card incident interfered with the Section 7 rights of Simmons, as well as those of the Respondent's employees.[8]

3. The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Henson on July 16 for engaging in union activities. We do so for the following reasons.

Initially, we find that the General Counsel has made a strong showing that Henson's union activity was a motivating factor in the Respondent's decision to discharge her. Henson was an active member of the Union's organizing committee. The Respondent had knowledge of Henson's union activity at least as of July 8, when employee Chelle Bennett informed McCracken that the Union was planning a pizza lunch for the employees and that Henson was involved in organizing the lunch.[9] Her discharge occurred just 8 days later. In between those two events, the Respondent demonstrated substantial animus directed specifically at Henson's union activities. Thus, the Respondent violated Section 8(a)(1) of the Act by interrogating Henson, by engaging in unlawful surveillance and by creating the impression of surveillance of her union activities, and by issuing her an unlawful warning. Accordingly, under *Wright Line*, supra at fn. 4, the burden shifted to the Respondent to demonstrate that it would have discharged Henson even absent her union activity.

In its exceptions, the Respondent contends that it met its *Wright Line* burden and established that Henson was discharged for poor work performance. It cites the written complaints about Henson it solicited from other employees after Henson's unlawful warning and argues that even the judge found that Henson's workplace shortcomings were "real." We disagree.

[6] In finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating Henson regarding whether she or the Union paid for the pizza, the judge concluded that the Respondent's conduct was, in essence, "the setting of a trap," because the interrogation was designed only to force Henson to reveal her union propensity or lie about it. Although we agree with the judge's conclusion that the interrogation interfered with Henson's Sec. 7 rights, we find it unnecessary to pass on the judge's additional finding that the Respondent's conduct amounted to a "trap" in violation of Sec. 8(a)(1) of the Act.

In adopting the judge's finding that the Respondent coercively interrogated Henson, Member Brame relies on the totality of the circumstances here in that, after Henson responded untruthfully to its questioning, the Respondent surreptitiously obtained a copy of Simmons' credit card receipt, confronted Henson with this evidence, and then issued Henson a verbal warning for lying. Therefore, Member Brame finds that the Respondent's inquiry violated Sec. 8(a)(1) of the Act in light of these additional violations that the judge found. See generally *Bourne Co. v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

[7] The judge found, and we agree, that this warning violated Sec. 8(a)(1) of the Act.

[8] In his decision, the judge recommended, as part of the Respondent's remedy, that the Respondent be ordered to write a letter of apology to Simmons for having obtained access to his personal financial records and simultaneously post the letter next to the official notice to employees at the Respondent's plant in Portland, Oregon. We shall delete this recommended remedy and instead order the Respondent to mail a copy of the notice to employees to Simmons. Such a remedy is sufficient, in our view, to effectuate the purposes of the Act.

[9] We find it unnecessary to rely on the judge's finding that the Respondent had knowledge of Henson's union activity as early as June 13, when she openly placed union campaign flyers on her desk.

"Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct." *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991). As set forth above, we have found that by attempting to secure information from Henson concerning the extent to which she had chosen to engage in organizational activities and by thereafter warning her when it was dissatisfied with her answer, the Respondent violated the Act. Given these findings, the Respondent could satisfy its *Wright Line* burden only by showing that the discharge would have occurred even in the absence of the unlawful warning. This it failed to do. To the contrary, the record indicates a clear linkage between the unlawful warning and the discharge. Thus, at the time it issued the unlawful warning, the Respondent informed Henson that her next infraction would result in termination. Further, the complaints the Respondent relied on in discharging Henson were solicited by the Respondent soon after it learned of her union activities and immediately after it issued her the unlawful warning. Accordingly, we cannot find that the Respondent has shown that it would have discharged Henson even absent her unlawful warning. For these reasons, we agree with the judge that Henson's discharge violated Section 8(a)(3) and (1) of the Act.[10]

4. The judge found that the Respondent violated Section 8(a)(1) of the Act when it catered a free barbecue lunch for the employees. The evidence shows that the Respondent had never had a free luncheon for the employees and that it gave no reason to the employees for the June 25 barbecue. Based on the timing of the event, the judge found that the employees reasonably concluded that the Respondent catered the lunch in order "to offset any union claim that Respondent was not sympathetic to its employees." The judge also found that even though the cost of the food was minimal, the Respondent provided the lunch primarily to induce the employees to refrain from seeking union representation. Because the lunch was provided in response to union organizing and it was a departure from past practice, the judge concluded that the Respondent's conduct interfered with the employees' statutory rights.

We disagree with the judge's finding. The Board has consistently held that, absent special circumstances, it is a legitimate campaign device and not coercive for an employer to provide free food and drinks to employees. *Waste Management of Palm Beach*, 329 NLRB 198 (1999), citing *L. M. Berry & Co.*, 266 NLRB 47, 51 (1983). There are no "special circumstances" here. Indeed, the evidence shows that the Respondent sponsored the free luncheon at a cost for the food of less than $5 per employee. See *Chicagoland Television News, Inc.*, 328 NLRB 367 (1999). Accordingly, we reverse the judge's finding and dismiss this allegation.

[10] Although Member Brame agrees with his colleagues that the Respondent discriminatorily discharged employee Henson, he finds it unnecessary to rely on the judge's conclusion that the statements the Respondent solicited from other employees documenting their complaints about Henson "actually contribute[d] to the [General Counsel's] prima facie case" instead of supporting the Respondent's defense to this allegation.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 5.

"5. On July 8, 1998, the Respondent, through Smith and McCracken, violated Section 8(a)(1) by (a) interrogating Henson regarding her union activity; (b) engaging in surveillance and creating the impression of surveillance of employees engaged in union activity or activity protected by Section 7 of the Act by obtaining through trickery the credit card receipt of union organizer, Tom Simmons, and confronting Henson with it; and (c) by issuing employee Henson a warning because she refused to reveal her Section 7 activities to them."

2. Delete the judge's Conclusions of Law 3 and 4 and renumber the subsequent paragraphs accordingly.

ORDER

The National Labor Relations Board orders that the Respondent, Far West Fibers, Inc. d/b/a E-Z Recycling, Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their union activities.

(b) Issuing employees warnings because they refuse to reveal their Section 7 activities to management.

(c) Engaging in surveillance or giving the impression of surveillance of employees who are engaged in union activity or other activity protected by Section 7 of the Act.

(d) Investigating the financial records of employee/volunteer union organizers in order to deter them from union organizing.

(e) Discharging or otherwise discriminating against employees because they have engaged in activities for and on behalf of the Association of Western Pulp and Paper Workers, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO, or on behalf of any other union.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Krista Henson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Krista Henson whole for any loss of earnings and other benefits she suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning and discharge of Krista Henson, and within 3 days thereafter notify Henson in writing that this has been done and that neither the warning nor the discharge will be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its plant in Portland, Oregon, copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 8, 1998.

(f) Within 14 days after service by the Region, mail a signed copy of the official notice to employees to union organizer and statutory employee Tom Simmons.

(g) Within 21 days after service by the Region, the Respondent shall file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate employees regarding their union activities.

WE WILL NOT issue employees warnings because they refuse to reveal their Section 7 activities to management.

WE WILL NOT place employees under surveillance or give the impression of surveillance of employees who are engaged in union activity or other activity protected by Section 7 of the Act.

WE WILL NOT investigate the financial records of employee/volunteer union organizers in order to deter them from union organizing.

WE WILL NOT discharge or otherwise discriminate against employees because they have engaged in activities for and on behalf of the Association Of Western Pulp And Paper Workers, a/w the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (AWPPW), or on behalf of any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Krista Henson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Krista Henson whole, with interest, for any loss of earnings and other benefits she suffered as a result of our discrimination against her.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful warning and discharge of Krista Henson, and WE WILL, within 3 days thereafter, notify Henson in writing that this has been done and that neither the warning nor the discharge will be used against her in any way.

FAR WEST FIBERS, INC. D/B/A E-Z RECYCLING

Stephanie Cottrell, for the General Counsel.

Richard Van Cleave (Davis, Wright & Tremaine), of Portland, Oregon, for the Respondent.

Mark Bozarth, Representative, Association of Western Pulb and Paper Workers, of Portland, Oregon, for the Charging Party.

[11] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

BENCH DECISION AND CERTIFICATION

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Portland, Oregon, on April 6, 1999. It was orally argued on May 3 and the attached Bench Decision was rendered on May 19. The charges were filed on May 26 and July 24, 1998, respectively, by the Association of Western Pulp and dPaper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO. The consolidated complaint issued January 29, 1999. It alleges that Respondent violated Section 8(a)(3) and (1) of the Act. Respondent's answer denied the commission of any unfair labor practice.

After hearing the evidence on April 6, 1999, I determined that it was appropriate for me to issue a bench decision under the Board's Rule 102.35(a)(10). Pursuant to the Board's Rule 102.45(a), I hereby attach pages 262–291 of the transcript to this decision as Appendix A and certify that it (including interlineal corrections), is an accurate transcription[1] of my decision as delivered.[2]

Appendix B [omitted from publication] is the recommended notice to employees. The Regional Director is given discretion to require its publication/posting in any foreign language he deems appropriate.

"APPENDIX A"

P R O C E E D I N G S

[Errors in the transcript have been noted and corrected.]

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ADMINISTRATIVE LAW JUDGE KENNEDY: This is a resumption of Far West Fibers, dba E-Z Recycling. Case 36–CA–08233. This is being—this is the Bench Decision that's being conducted by telephone conference.

Participating in the conference are the Counsel for the General Counsel, Ms. Stephanie Cottrell, Counsel for Respondent, Richard Van Cleave, and a representative from the Charging Party, Mark Bozart. They are all on the line. And I'm just going to begin.

I will probably advise people that I'm going to treat this as if it were dictation, so I will be giving instructions to the transcriber as we go. I hope that isn't too distracting.

MR. VAN CLEAVE: Judge, this is Mr. Van Cleave. We're losing you. You're cutting in and out.

ADMINISTRATIVE LAW JUDGE KENNEDY: Am I?

MR. VAN CLEAVE: Yeah.

ADMINISTRATIVE LAW JUDGE KENNEDY: Well, I'll try—well, let's just keep trying, and if it's a problem, we'll start over again.

MR. VAN CLEAVE: Okay.

ADMINISTRATIVE LAW JUDGE KENNEDY: All right. The heading is:

BENCH DECISION

Evidence was taken in this matter on April 6, 1999. An oral argument was conducted

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by telephone conference on May 3. I've considered the evidence and taken into account the respective arguments made by the General Counsel and by Respondent.

The Allegations

In chronological order, the complaint makes the following allegations:

1. On June 16, 1998, Respondent unlawfully suspended employee, Krista Henson, for one day because of her union activities.

2. On June 24, Respondent's general manager, Keith Ristau, interfered with Henson's union activity by surreptitiously listening in on some telephone calls, one of which was with a union official.

3. The following day, June 25, Respondent provided employees with a barbecue lunch in order to discourage them from union activity.

4. On July 8, Respondent, through Assistant Manager Mike McCracken and General Manager Mary Sue Smith,

a) interrogated Henson regarding her union activity—specifically whether she or the union were paying for a pizza lunch that day.

b) unlawfully surveilled Henson and the union through posing as a union representative and tricking the pizza parlor into giving a copy of the credit card payment receipt, signed by a union official

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to Respondent's McCracken.

c) issuing Henson a written warning that day for her behavior.

5. On July 16, discharging Henson because of her union activity.

6. On July 27, refusing to rehire its former employee, Bruce Montgomery.

The Evidence

A. **The Pleadings**.

Respondent admits it is an Oregon corporation. It operates several paper recycling facilities in Oregon and Washington, including this one located in Portland, doing business as E-Z Recycling. It admits that it annually sells and ships products valued in excess of $50,000 from Oregon to other states. And further admits it is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act. It also admits that the Charging Party, the Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL–CIO, the (AWPPW) is a labor organization within the meaning of Section 2(5) of the Act.

Respondent also admits that the following managers are supervisors, as defined by Section 2(11) and agents as defined by Section 2(13) of the Act: Mary Sue Smith, General Manager; Keith Ristau, General Manager; Mike McCracken, Assistant Plant

[1] The transcript pages reproduced in Appendix A are copied verbatim from the reporting service's diskette. They have been reformatted to allow for the corrections which have been shown. The reformatting process resulted in fewer lines per page and those lines have been renumbered. The pagination remains accurate.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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Manager.

B. **The testimony**.

In large part, the testimony is not in significant dispute. Where there is testimonial disagreement, it is not particularly dispositive, and therefore, unnecessary to resolve it.

Respondent's Portland employees are not represented by any union. At that facility, employs, among others, sorters, maintenance workers, scales clerks/scales masters, and an office staff.

(1) Krista Henson.

Krista Henson was hired as a scales clerk in October 1997. She had sometime previously worked for Respondent through a temporary agency. As one of the two scales clerks, she prepared shipment and receiving paperwork, weighed trucks in and out, served as a cashier and answered the telephone. Ristau was her immediate supervisor.

Bruce Montgomery was a plant maintenance employee, who had been hired in September 1996, and who was discharged in late May 1998. His discharge is not a subject of the Complaint, which alleges only that Respondent illegally refused to rehire him on July 24, 1998.

I may have to correct that date there. The Complaint alleged the 24th or the 27th, Ms. Cottrell?

MS. COTTRELL: I believe we have amended it at trial to

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the 27th.

ADMINISTRATIVE LAW JUDGE KENNEDY: Okay. So that should be the 27th.

July 27, 1998. Montgomery's immediate "supervisor" (more likely a lead person) was David Rowlands. Prior to May 18, 1998, Rowlands was in charge of two maintenance workers, Montgomery and Mike Pollock. After May 18, 1998, Rowlands became a "floater," travelling between plants and managing the furnaces.

Rowlands was the individual who first contacted the AWPPW. He did so by telephone in late April or early May 1998. Both Montgomery and Pollock were with Rowlands when he made the call. On May 7 or 8th, those three met with AWPPW officials at the Wooden Chicken Restaurant. Eventually, an organizing committee was formed, consisting first of Rowlands, Montgomery and Pollock. Shortly thereafter, Henson joined the committee, and Montgomery dropped out after he was discharged.

On June 13, Union Organizer Tom Simmons handed out flyers in front of the premises. Henson obtained several of them and placed them on her desk face up, to be taken and read by anyone who wished. The scales office where she works has heavy employee and management traffic. She says Ristau looked at the flyers on her desk but said nothing. The flyers were brightly colored, of the neon variety, whose colors were sure to attract notice.

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On June 16, Ristau issued a written warning to Henson assertively for being rude to a customer on the telephone. Ristau said that when he spoke to the customer, the customer told him the person who answered the phone was either in a real hurry or was having a bad day—she had been short with him. He could not describe the incident in any greater detail, or even when it occurred. The write-up also mentioned other incidents as well, which are also devoid of detail. During his meeting with Henson regarding the write-up, he advised her that she was to receive a one-day suspension, because it was considered a "second such warning." In fact, however, it was her first warning, and Ristau knew it. He explained to her that he was considering her "annual" appraisal of April 1 to be the first warning. In fact, the appraisal did not cover a year, but only five months, as she had been hired in late October 1997. In general, it describes her as an "average" employee, noting work habits which could be improved.

One of the remarks in the appraisal form was that she could be short or abrupt with customers. They also included remarks about her becoming upset with "dumb questions," that she was sometimes lax in her work, and sometimes developed an attitude towards her superiors. It concluded with observing that she had only a few short months of experience, while others had many, many years.

But there are at least three remarkable aspects about this

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warning/suspension. First, the incident is poorly described, and thus, vague as to both particulars and the date and times the incidents occurred. Indeed, the space on the form for that information was left blank. Two, calling a periodic appraisal a warning is an unusual personnel practice. Three, combining the appraisal with a vague warning so that the matter immediately progresses to the suspension stage seems to be evidence that Ristau was in a hurry to get to and then justify the suspension. The entire procedure seems artificial.

About a week and a half later, on June 24, Henson and a fellow employee, Valerie Dodd, had a heated discussion regarding Henson's involvement in the organizing. As a result, Henson, while on her break, went to the conference room and made two telephone calls, one to Union Organizer Simmons, and one to her fiancé. She was upset, crying and spoke loudly enough to be heard through closed doors. She also used loud epithets as she spoke. After she completed the calls, she exited the conference room still upset. Ristau intercepted her and took her back into the room. He told her he had heard the conversation and asked if she wanted to talk about it. She declined. That exchange was repeated, and she told him she regarded the conversations as private and didn't wish to discuss them with him.

She acknowledges that she had referred to Ristau during the call to Simmons in foul terms, and that in part of the conversation with Ristau, he wanted to know why. There's no

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evidence that Ristau had listened to the conversations by extension line, only that he had heard her side of the conversations through the walls because she had spoken so loudly. That is confirmed by Dodd. Dodd also says she overheard Henson refer to her in profane terms during those conversations.

On the following day, June 25, for the first time in the history of the company, Respondent arranged for a catered barbecue lunch for its entire staff. There was no special occasion to celebrate or any other explanation for it. Yet, no management official mentioned the union in connection with the barbecue.

Nonetheless, Henson, and apparently the organizing committee, became persuaded that the barbecue was in direct response to Respondent's realization that its employees were considering union representation.

On July 7, the union organizing committee decided to use a similar tactic. The union, through Simmons, decided to sponsor a pizza lunch the following day. The next morning, July 8, Simmons went to a Round Table Restaurant near the plant to await Henson's order so he could pay for it with his VISA credit card. In the meantime, Henson had told employees about the pizza lunch, including office employee, Chelle Bennett. Bennett informed Assistant Plant Manager McCracken of Henson's plan. McCracken took the matter to General Manager Smith, they in turn

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informed the company majority owner, John Drew. After talking together, they decided to investigate the matter further. While this was occurring, Henson called the Round Table and placed the order. Simmons did pay for it using his personal VISA card, and obtained a credit card receipt.

Shortly after Henson placed the order, sometime before 10:00 a.m., McCracken asked her about the pizza and who had paid for it. She told him that she had paid for it. She then said he needed proof that she had done so. She asserted that she had prepaid by credit card and could not show him the proof.

McCracken claims that the company had made a decision to allow the pizza to be delivered no matter who had paid for it, Henson or the union. Oddly however, McCracken then took some underhanded steps to find out who had paid for the pizza. He seemed to have a special need to find out who had paid, even though he acknowledges that he was pretty sure (from information provided by Bennett) that it was the union. He wanted to "verify" what Henson had told him. In fact, he was sure Henson had lied about who was paying and he wanted to prove it.

To that end, he called the Round Table Pizza Restaurant, falsely claimed to be an "associate" of Simmons, and asked for a copy of the credit card receipt. He drove to the restaurant and got a reprint of the receipt from the manager. McCracken's admission here was reluctant, and he was loath to admit that he had tricked the Round Table manager in to giving him the

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receipt. Even in his own notes, Respondent's Exhibit 11, he glosses over his trickery.

McCracken then reported to Smith that Henson had not paid for the pizza and had lied when she said she had.

Smith says she gave instructions to McCracken to issue a warning to Henson for not being truthful about the source of the pizza, and for being insubordinate in her conversation with McCracken that morning. She claims she did not consider discharge at that point.

Later that afternoon, Smith and McCracken spoke to Henson. Smith says she continued to deny that the union was the source of the pizza. When they confronted her with Simmons' credit card receipt, she says Henson told them that Simmons was a personal friend. Henson says she told them they should not have had Simmons' receipt, and that she lied because she was being pressured by McCracken. She says they told her that the next transgression would result in her termination.

The meeting ended prematurely when Henson said she wasn't feeling well due to an ankle injury she had suffered a few days before. She asked to go home.

A few minutes after Henson left Smith's office, Smith says a commotion occurred down the hallway. Smith went to find out what was happening and learned that some sort of argument had ensued between Henson and employees, Diana White and Dodd.

Smith says she later told them that it was not their place

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to argue with fellow employees, that if they had a problem they should describe it in written form. According to Smith, this direction resulted in numerous written complaints being filed on or around July 9 concerning Henson. These complaints are in evidence as Respondent's 2 through 9, although some of them do precede the 9th by a day or two.

Smith says that after receiving these complaints, and after consulting with Drew and Attorney Mark Hutchinson, that she made the decision to discharge Henson. On July 16, about 8:15 a.m., Ristau called Henson to Smith's office. Smith told her that she had been investigating the incidents from the past, and had been talking to people about her, and as a result, Smith had determined to discharge her.

Respondent's 10 is a list of the incidents to which Smith referred, and which she read to Henson during the meeting. They also contain Henson's denials. These range from calling people obscene names, to referring to people in obscene terms, to poor telephone manners, arguing, being disrespectful to supervisors, and failing to follow company closing and bookkeeping procedures.

(2) **Bruce Montgomery**

As noted above, Bruce Montgomery had been discharged in late May 1998. He had been one of the early members of the organizing committee, but there's no proof that Respondent knew it at the time he was discharged. Moreover, he admitted to

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having obtained a private memo from Ristau's office without permission. That memo related to the recruitment of an employee who seemed to be aimed at taking Rowlands' job.

Rowlands, also as noted above, had become the "floater" on June 18. He became concerned about Montgomery's circumstances and knew that Montgomery had taken the blame for the purloined memo to protect the employee, Reece, who had actually done it.

On July 23, 1998, Rowlands met with company majority owner, John Drew, and another owner, Jeff Murray. He told Drew that Montgomery really hadn't entered Ristau's office, that Reece had. Rowlands said Drew, told him he would look into it. On July 27, Rowlands said he met with Murray to ask if he were going to reinstate Montgomery. He says Murray told them that they could not do anything more about it because Montgomery was involved with the union, and Drew could not talk to Rowlands about it anymore.

At some point Smith and Drew (but not Murray) did reconsider the Montgomery situation. According to a handwritten memo by Drew, dated July 29, that reconsideration only took the form of observing that Montgomery had changed his story and that the NLRB Regional Office was likely to reject the unfair labor practice charge which the union had filed.

There's no evidence that anyone, not even Rowlands, has ever asked that Montgomery be reinstated. Montgomery testi-

fied that he has never asked for reinstatement, or ever authorized

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Rowlands to do so on his behalf. Moreover, Rowlands' testimony never amounts to an actual request for reinstatement. At best, he simply advises the managers that another employee had committed the act for which Montgomery had been discharged. He seems only to be hoping that the company will correct an injustice. He never claims to have specifically requested Montgomery's reinstatement.

Analysis

A) **Henson**

Rather clearly, Krista Henson was a known union activist. She was a member of the organizing committee. She had public discussions with fellow employees. She placed a stack of union flyers at her desk, which managers such as Ristau, and probably McCracken, were likely to have seen. Employee Bennett told McCracken that Henson and the union were going to buy pizzas to distribute to the employees on July 9.

Also rather clearly, based on Henson's April appraisal, and my assessment of her demeanor, Henson has several workplace shortcomings. These shortcomings were real, and in the main, are due to Henson's own inability to recognize and accept criticism. She was a new employee, new to the workforce, and not very understanding of the need to be courteous and respectful to both the employer and its customers, as well as her fellow employees. She was, and is, immature.

Having made both of these observations, I note only that

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these are competing considerations when analyzing the overall circumstances.

In determining whether or not an employer has discharged an employee because of his or her union activities, the prima facie case requires evidence of: union activity, which is known to the employer; that the employer harbors union animus; that the animus is connected to the discharge, either by timing or some other connection.

Animus can take several forms. It may manifest itself through other unlawful conduct, such as 8(A)(1) threats or promises—conduct which reasonably tend to interfere with the free exercise of rights guaranteed by the Act. See *El Rancho Market*, 235 NLRB 468, 461 (1978). The granting of benefits in response to union organizing is generally considered to be a violation, so of course, are creating the impression that an employee's union activities are under surveillance, and coercively questioning an employee about his or her union activity. Animus could also be inferred from other conduct. For example, mendacity connected to union organizing or an unexplained departure from a routine.

The prima facie case can be rebutted by a showing, through a preponderance of the evidence, that the employer would have done the same thing regardless of whether or not the employee had engaged in union activity. See Wr*ight Line*, 251 NLRB 1083, enfd. 662, F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989

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(1982). The doctrine was approved in *NLRB v. Transportation Management*, 462 U.S. 393 (1983).

In this case the General Counsel has made out a prima facie case with respect to Henson. First, Henson has clearly been engaged in union activities, starting in early June 1998. She was reasonably open about it, beginning June 13, when she placed the AWPPW flyers on her desk. There is undenied evidence that Supervisor Ristau did see it, and Assistant Plant Manager McCracken probably saw it. The extent of her activity became even more widely known in July when she participated in the pizza purchase.

However, the warning and suspension of June 16 is the first evidence of union animus. I will not quarrel with Respondent's so-called annual appraisal of Henson in early April, even though a year had not passed since she had been hired. I accept the explanation that everyone is appraised in April. I do find, however, that declaring the warning of June 16 to be her second warning, leading to the suspension, to be an unusual deviation from standard procedure. Appraisals are not warnings. Whatever may have been said in the appraisal amounts to pointing out areas where an employee may improve himself or herself. It is not and cannot be considered a warning aimed at a specific act.

Thus, I find that calling the June 16 warning a second warning, permitting suspension, to be an unexplained

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departure from the norm, indeed, a devious way to advance to the punishment stage. Clearly, it was intended as a dual message to Henson. First, it had the legitimate purpose of trying to get her to correct some poor work habits. But second, it was to let her know that her union activity would not go unnoticed or would not be without cost. As such, it demonstrates that Respondent harbors union animus. Rather clearly, the warning and suspension violated Section 8(A)(1) and (3). Had the matter stopped with only a warning, treated as a first warning (which it clearly was), my analysis might be different.

The animus continued to be visible in July. On July 9, McCracken (affirmed by Smith and Drew) despite the knowledge of Henson's union connection obtained from Bennett, nonetheless interrogated Henson regarding the true source of the funds for the pizza. The interrogation was entirely unnecessary and was designed only to force Henson either to reveal what Respondent already knew, her union propensity, or to force her to lie about it. Forcing Henson to lie was, in essence, the setting of a trap. But the animus went further, McCracken falsely told the pizza restaurant manager that he was Simmons' associate, thereby deceitfully impersonating a union official and fraudulently obtaining a copy of Simmons' credit card receipt.

All for what purpose? Only to confront Henson with it - to prove that she was lying and to show how dangerous it was to

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associate herself with the union. Rather clearly, this conduct has the reasonable tendency to interfere with Henson's Section 7 right to seek representation by a union. Thus, the interrogation violated Section 8(A)(1) of the Act.

The credit card receipt incident qualifies as two types of violations. First, by confronting Henson with the credit card receipt, Respondent demonstrated that it could create the impression of surveillance of employees' union activity, as well as proving that it had the actual capability and the will to find out what union activities the employees were engaged in. More-

over, it demonstrated that it could actually gain access to a union official's personal finance files and get the information.

This truly was a devious destructive act, insofar as the invasion of Section 7 rights is concerned. Not to mention an outrageous invasion of Simmons' personal files.

Simmons, by the way, is a statutory employee himself. He is an employee of Fiber Web North America in Washougal, Washington. He serves as a voluntary organizer for the AWPPW.

Therefore, Respondent's invasion of Simmons' personal credit card records not only coerced Respondent's own employees in the exercise of their Section 7 rights, it also interfered with Simmons' Section 7 right to be a volunteer union organizer. There's no question in my mind that McCracken's behavior had the reasonable tendency to interfere with Simmons' right to serve as

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a union volunteer. An NLRA remedy for this 8(A)(1) violation is entirely warranted. The conduct was admitted and has therefore been fully litigated. I shall issue an appropriate order with respect to that act.

Finally, as I said before, Respondent laid a trap for Henson. She could either admit her union activity or lie about it. She chose to lie and Respondent then issued her a warning for lying. That trap, too, violates Section 8(A)(1). Indeed, such a trap attacks the very heart of the Act. An employee may not be put to such a dilemma without entirely disregarding the protections the Act provides. Henson could not engage in the simple act of helping the union in its effort to organize Respondent's employees without some sort of negative impact. Either she revealed what she was doing or she lied about it, only to be exposed and punished.

That she walked out of the meeting with Smith and McCracken upset and got involved in a confrontation almost immediately was entirely predictable. She had been trapped and embarrassed. But Respondent did not stop there, it took advantage of the fact that Henson had some employment-related shortcomings. Smith suggested to the staff that she would do nothing about Henson unless the employees documented their complaints about her. This resulted in several memos to Smith from other staff members, all complaining about something Henson had done or had failed to do.

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In general, I will not question the verities of the complaints set forth in the memos. At least one precedes the incident of July 9. And, my own assessment of Henson's demeanor on the stand leads me to conclude that some of the shortcomings - at least those related to personality—have some validity.

Even so, they do not rise to a valid defense under *Wright Line*. Respondent did not fire Henson because the complaints were valid, it used them as part of an overall scheme to cover its true motive, to get rid of a union activist. Had Henson not been engaged in union activity, Respondent would not have trapped her as it did, and Smith would not have been motivated to induce the avalanche of complaints, which came immediately after the July 9 incident.

Thus, the memos, far from being a defense to the prima facie case, actually contribute to the prima facie case.

Thus, the prima facie case stands entirely unrebutted, no *Wright Line* defense has been established, much less become persuasive. I therefore find Respondent violated Section 8(A)(1) and (3) on July 16, 1998, when it discharged Krista Henson.

One other issue remains insofar as Henson is concerned. Did Respondent, through Ristau, violate 8(A)(1) of the Act when he overheard her on the telephone on July 24? I conclude that it did not. Her testimony, as well as that of others, is that she spoke loudly and angrily, and her voice was so loud it was

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easily overheard through the walls. Ristau heard her and so did Dodd. He became aware of how upset she was and simply asked her if she wanted to talk about it with him. First, she provided the means to be heard herself, by speaking loudly and in a distraught manner; and second, she forced people to listen. No surveillance or impression of surveillance can be inferred in that circumstance. Second, her emotional state seemed to be a call for help, and Ristau's response was simply an offer of help. He was not seeking to inquire about her protected activity, nor can one reasonably think he was. This allegation should be dismissed. Lastly, with respect to Henson, Respondent argues that the union animus relied upon was dissipated by Respondent's having lent or given $2000 to Henson for legal representation related to a domestic affairs matter which she was having. I have considered the loan and the grant, but find Smith's authorizing it to be insufficient to outweigh the evidence of union animus elsewhere in the record.

B) **The barbecue benefit.**

On June 25, 1998, the day after Ristau overheard Henson talking to a union official on the telephone, and about two weeks after the union hand-billed Respondent's facility, the company gave its employees a free catered barbecue lunch. The evidence is clear that Respondent had never provided such a benefit to employees before. The only other time Respondent had sponsored a dinner was an annual potluck dinner during the holiday

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season. Even there, Respondent did not provide food.

I am aware that the amount of this benefit was not great, the price of a lunch, probably less than $5. Even so, it was given to all of Respondent's employees. While Respondent gave no reason for the benefit, the employees reasonably concluded that its purpose was to offset any union claim that Respondent was not sympathetic to its employees. Moreover, the timing is connected to the onset of the organizing drive. It occurred about ten days after the union began leafleting, and one day after Henson was overheard talking to a union official on the telephone. In that circumstance, I find that the purpose of this benefit was to induce employees to refrain from seeking union representation by depicting itself as an employee-friendly employer. The practice of conducting the barbecue lunches did continue for several times thereafter. As such things go, this benefit is relatively minor. Even so, it was in response to the union organizing, and it was a significant departure from its previous practice. I'm therefore compelled to find that the grant of the barbecue lunch tended to interfere with the employees' exercise of Section 7 rights, and therefore, violated Section 8(A)(1). See generally *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 686 (1944). Also *Del Ray Tortilleria,* 272 NLRB 1106 (1984), enfd. 787 F.2d 1118, (7th Cir. 1986).

C) **Bruce Montgomery**

The Complaint, as amended, alleges that Respondent refused

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to rehire Montgomery on July 27 because of his union activity subsequent to his lawful discharge in May.

The Board's decision in *Big E's Foodland*, 242 NLRB 963, 968 (1979), sets forth the elements of an unlawful refusal to hire or rehire. There must first be an application for rehire made by the alleged discriminatee. That must be followed by a refusal to hire the discriminatee. Connected to those requirements are that the applicant must be expected to be seen as a union supporter, that the employer viewed the applicant as such, and the employer maintained animus against such persons and that the refusal to hire or rehire is connected to that animus.

Here, the Montgomery allegation fails the first element. Montgomery never reapplied for his job, nor did he authorize Rowlands to apply for him. Indeed, Rowlands never actually asked Respondent to rehire Montgomery. All he ever did was to assert that Respondent had been misled into firing Montgomery, and to suggest that Respondent look into it to see if, on its own, it would change its mind.

Rowlands did succeed in getting Smith and Drew to take a second look at it. By that time, the AWPPW had filed unfair labor practice charges, which were then under investigation. Smith and Drew simply looked to see whether Rowlands' description of the facts changed anything. They concluded it did not, but would make Montgomery look even worse to the NLRB investigator because he would have told two inconsistent

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stories. This latter observation undermines a second requirement that the decision to not rehire be motivated by union animus. Here, despite the union animus seen elsewhere in the case, Respondent's officials simply decided to await the outcome of the NLRB investigation into Montgomery's discharge before deciding anything. Therefore, the Montgomery allegation will be dismissed. Neither he nor anybody ever applied for reinstatement. And further, whatever action Respondent did take was not based upon union animus. It is true that Rowlands does say that Murray told him they could not do anything more about Montgomery because he was involved with the union. The General Counsel looks to that statement as an unrebutted admission of a Section 8(A)(3) violation, but I do not concur. First, there is no evidence that Murray was involved in the reconsideration of Montgomery's situation at all. Second, if Murray said it, or something similar, it was only a reference to the fact that the NLRB was investigating the unfair labor practice charge filed on Montgomery's behalf by the AWPPW. It is simply too ambiguous to have any significance. Based on the foregoing findings of fact, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The AWPPW is a labor organization within the meaning of Section 2(5) of the Act.

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3. On June 16, 1998, Respondent violated Section 8(A)(1) and (3) of the Act when it warned and suspended its employee, Krista Henson, because of her activities for and on behalf of the AWPPW.

4. On June 25, 1998, Respondent violated Section 8(A)(1) by granting employees the benefit of a free barbecue lunch, where its purpose was to interfere with the employees' right to seek union representation.

5. On July 9, 1998, Respondent, through Smith and McCracken, violated Section 8(A)(1) by: a) interrogating Henson regarding her union activity. b) surveilling and giving the impression of surveilling employees who were engaged in union activity or activity protected by Section 7 of the Act. c) issuing employee Henson a warning because she refused to reveal her Section 7 activities to them.

6. On July 9, Respondent violated Section 8(A)(1) by obtaining through trick the credit card record of a union official and statutory employee, Tom Simmons.

7. On July 16, 1998, Respondent violated Section 8(A)(3) and (1) when it discharged its employee, Krista Henson, because of her union activities.

8. Respondent did not violate Section 8(A)(1) on June 24, 1998, when its Supervisor Ristau overheard Henson's telephone call and responded to its emotional nature.

9. Respondent did not violate Section 8(A)(3) and (1) on

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July 27 when it reviewed its nondiscriminatory discharge of Bruce Montgomery in late May, and decided to let its decision stand.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As it discriminatorily suspended Krista Henson, it must make her whole for any loss of earnings from that suspension plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Furthermore, since it subsequently discharged Henson, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement is made, less any net interim earnings, as prescribed by *F.W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Because of Respondent's outrageous misconduct, demonstrating a disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. See *Hickmott Foods,* 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]